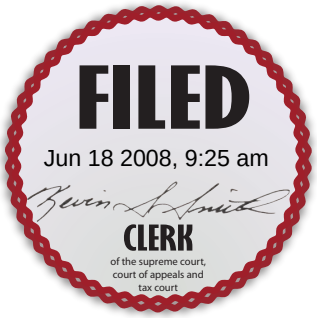

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IN THE
COURT OF APPEALS OF INDIANA

MARQUES LOVE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1061
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No.49G03-0611-MR-218901

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Marques Love appeals his sixty-year sentence for murder, a felony. Love raises two issues, which we restate as whether the trial court abused its discretion in finding the aggravating and mitigating circumstances[1] and whether his sentence is inappropriate given the nature of the offense and his character. Concluding the trial court did not abuse its discretion and that Love's sentence is not inappropriate, we affirm.

Facts and Procedural History

On November 14, 2006, Love encountered Scoey Scott at a gas station in Indianapolis, Indiana. Previously, Love and Scott were good friends and lived together, but had a falling out and no longer were friends. Love and Scott argued, and Love got in his vehicle and left the gas station. On his way home, Love realized he forgot some items at the gas station, and returned. Love parked his car near Scott's vehicle. As Love exited his vehicle, he heard a noise and believed that Scott had thrown rocks at Love's vehicle. A physical altercation ensued. At some point, Love drew a gun and shot Scott, who fell to his knees. Love then fired at least two more shots at Scott, and Scott fell all the way to the ground and died before medical help arrived. Love then left the scene, but later returned with his father and was arrested for Scott's murder.

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[1] Love indicates that he is raising only the issue of the appropriateness of his sentence. However, in his appellate brief, he argues that the trial court found improper aggravating circumstances. The State addresses these issues separately. We will therefore address Love's challenges to his sentence as two distinct issues.

On November 16, 2006, the State charged Love with murder. On December 15, 2006, Love filed a notice of self-defense. Love waived his right to a jury trial, and on October 25 and 26, 2007, the trial court held a bench trial, after which it found Love guilty of murder. On November 2, 2007, the trial court held a sentencing hearing. At this hearing, the trial court found as mitigating circumstances: 1) Love was twenty-nine years old and had accumulated only a single conviction of driving with a suspended license; 2) Love had worked during his life and "was a productive citizen in our community," transcript at 461; 3) Love's military training; 4) Love was supporting his children; and 5) Love had the support of his family. The trial court either declined to find Love's expression of remorse as a mitigating circumstance or found it as a mitigating circumstance but declined to give it significant weight,[2] stating "I think you know some of the right things to say, but I don't know how sincere it really is right now as you sit there." Id. at 462. The trial court also noted that Love was "still focused on the fact that you want to justify your actions to everyone else, and you've missed the focus of your report, which was, you were convicted of Murder, which means I didn't believe you were acting in self-defense." Id. As aggravating circumstances, the trial court found the nature and circumstances of the crime, noting Love had been friends with the victim; Love had left the gas station and returned, knowing Scott was there, and parked directly next to Scott; and the number of shots fired, especially the fact that Love continued to fire

[2] The trial court initially stated, "One of the things, though, that I do not accept and find as a specific mitigating circumstance is your expression of remorse," tr. at 462, but later indicated that "in giving it weight as a mitigating circumstance, I did not give it significant weight," id. at 463.

after the physical altercation had ended. The trial court elaborated on this last point: "What is most compelling and aggravating, however . . . [is] your last shot to Scoey Scott was when he was on his knees, in a surrender position, to the head. . . . And to think this is a man that you had in your home, grew up with, shared good times with." Id. at 465-66. The trial court then sentenced Love to sixty years, all executed. Love now appeals.

Discussion and Decision

I. Aggravating and Mitigating Circumstances

A. Standard of Review

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

B. Nature and Circumstances of the Crime

Love argues that the trial court abused its discretion in finding the nature and circumstances of the crime to be aggravating, as this circumstance was "implicit in a conviction for murder." Appellant's Brief at 7. We recognize that circumstances that comprise the very essence of a crime cannot properly serve as aggravating circumstances. See Johnson v. State, 687 N.E.2d 345, 347 (Ind. 1997) ("A factor constituting a material element of a crime cannot be considered an aggravating circumstance in determining sentence."). However, "the particularized individual circumstances may be considered as a separate aggravating factor." Williams v. State, 619 N.E.2d 569, 573 (Ind. 1993). In its explanation of why it found the nature of Love's offense to be aggravating, the trial court identified particular circumstances beyond those necessary to constitute the offense of murder. Specifically, the trial court noted that Love returned to the gas station after already having argued with Scott and shot Scott in the head while he was on his knees in the "surrender position." Tr. at 466. As the trial court explained why it found Love's offense particularly aggravating, it did not abuse its discretion in finding that nature and circumstances of the offense as an aggravating circumstance. See McElroy v. State, 865 N.E.2d 584, 590 (Ind. 2007).

C. Relationship With the Victim

Love next argues that "[i]t is not a lawful statutory aggravator that the victim and defendant were friends." Appellant's Br. at 7. Initially, we note that the list of aggravators established by our legislature is not exclusive. Ind. Code § 35-38-1-7.1(c) (stating that the enumerated aggravating and mitigating circumstances "do not limit the

matters that the court may consider in determining the sentence"); see Storey v. State, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007), trans. denied. Also, we have found the fact that a defendant had a close relationship with the victim to constitute a valid aggravating circumstance. See Johnson v. State, 845 N.E.2d 147, 151 (Ind. Ct. App. 2006) (victim was child of defendant's neighbor), trans. denied; Reyes v. State, 828 N.E.2d 420, 424 (Ind. Ct. App. 2005), aff'd in relevant part, 848 N.E.2d 1081 (victim was defendant's friend and defendant used friendship to gain access to victim's home); cf. Carrico v. State, 775 N.E.2d 312, 315-16 (Ind. 2002) (trial court's comment that victim was defendant's friend and that defendant abused the victim's trust when he murdered him was a valid factor going to the nature and circumstances of the crime). In short, we conclude the trial court did not abuse its discretion by identifying Love's relationship with Scott as a sentencing consideration.

D. Remorse

Love next argues the trial court abused its discretion by considering his "desire to maintain his innocence as [an] aggravating circumstance[]." Appellant's Br. at 6. We agree that a trial court may not use as an aggravating circumstance that a defendant maintains his innocence in good faith. See Cox v. State, 780 N.E.2d 1150, 1158 (Ind. Ct. App. 2002).[3] However, the trial court did not find Love's lack of remorse to be an aggravating circumstance; it merely declined to find his remorse as a mitigating

[3] We note, however, that "[a] defendant's lack of remorse may be regarded as an aggravating factor even where the defendant insists upon his innocence unless the only evidence of guilt was the victim's uncorroborated testimony." Newsome v. State, 797 N.E.2d 293, 300 (Ind. Ct. App. 2003), trans. denied.

circumstance. Moreover, the trial court did not base its finding that Love lacked remorse solely on Love's maintaining his innocence. Cf. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001) (recognizing that the trial court "based its finding of lack of remorse on '[defendant's] demeanor today, his reference of record, [and] his state of dis[d]ain for the whole system,' not solely on his denial of the crime"). Instead, the trial court found that it did not believe Love's expressions of remorse were sincere. We grant trial courts broad discretion in evaluating the sincerity of a defendant's remorse. See Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court had the opportunity to observe Love, and, after discussing his alleged remorse at length, either declined to find it as a mitigating circumstance, or afforded it insignificant weight. We cannot say the trial court abused its discretion in so finding. See O'Neil v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (concluding the trial court did not abuse its discretion in declining to find the defendant's remorse to be a mitigating circumstance after discussing the proffered mitigator at the sentencing hearing).

E. Criminal History

Love argues that the trial court abused its discretion when it "acknowledged than [sic] ignored [his] lack of criminal history." Appellant's Br. at 8. The trial court specifically found Love's minor criminal history to be a mitigating circumstance, and we find no indication in the record that it ever "ignored" this factor. Moreover, as we do not review the weight given to mitigating circumstances, Anglemyer, 868 N.E.2d at 491, we cannot say the trial court abused its discretion in regard to its treatment of Love's criminal history.

II. Appropriateness of Love's Sentence

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

Here, the trial court sentenced Love to sixty years. This sentence falls midway between the advisory sentence and maximum sentence for murder.[4] See Ind. Code 35-50-2-3 (indicating the advisory sentence for murder is fifty-five years and the maximum sentence is sixty-five years).

B. Nature of the Offense and Character of the Offender

In regard to the nature of the offense, Love shot his unarmed, former friend several times, the last shots coming as Scott kneeled before him. We have little trouble concluding that the nature of the offense renders Love's crime more heinous than the typical murder. Cf. Ousley v. State, 807 N.E.2d 758, 765 (Ind. Ct. App. 2004) (holding sentence for murder that was ten years above the presumptive was appropriate based on the circumstances under which the defendant killed his wife); Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (holding sentences for murder that were ten years above the presumptive sentence were appropriate and noting that the murders were "execution style"), trans. denied; Groves v. State, 787 N.E.2d 401, 410 (Ind. Ct. App. 2003) (concluding that a maximum sentence for murder was appropriate and noting that the defendant killed the victim while the victim begged for his life), trans. denied.

We also note that Love's offense had a profound impact on Scott's family. See McElroy, 865 N.E.2d at 590 (recognizing that the "trial court did not abuse its discretion

[4] Of course, murder is also punishable by death or a life sentence without parole. See Ind. Code § 35-50-2-9. However, before the trial court may impose either of these sentences, the State must prove at least one statutory aggravating circumstance and the trier of fact must find that the aggravating circumstance or circumstances outweigh any mitigating circumstances. See id. The State did not proceed against Love under this statute. Therefore, although one charged with murder could face a maximum sentence of death, in regard to Love, the maximum sentence was sixty-five years.

in weighing the impact upon the victims and their families as part of the nature and circumstances of the offense"). Moreover, as Love had been good friends with Scott, he knew that he was killing a man with dependent children. Cf. Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (holding that impact on a victim's family is a proper aggravating circumstance if the impact is more substantial that that typically associated with the offense and the defendant could foresee this impact).

In regard to Love's character, we recognize that Love has a relatively minor criminal history, consisting of a single misdemeanor conviction of driving while suspended.[5] We agree that this lack of significant criminal history comments somewhat favorably on Love's character. We also recognize that the trial court found several mitigating factors that comment positively on Love's character, including Love's history of employment, military service, and family support.

We also note that Love apologized to Scott's family and expressed remorse. However, the effect that these expressions of remorse have on our analysis of Love's character is tempered by the trial court's findings that Love's expressions of remorse were not credible and that Love was not accepting responsibility for his actions. See McElroy, 865 N.E.2d at 592 (affirming maximum sentence for reckless homicide and

[5] Love was acquitted of felony charges of residential entry, pointing a firearm, and theft, had a misdemeanor charge of reckless driving dismissed pursuant to a plea agreement, and had a charge of driving with a suspended license dismissed for an unidentified reason. We may consider this arrest record in assessing Love's character, as it indicates that he has not been deterred from criminal behavior after having been subjected to police authority. See Rutherford v. State, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007).

noting that although the defendant apologized to the victims, he "deflected blame" for the incident).

Although we recognize that several factors comment favorably on Love's character, an even stronger indication of his character is the nature of the offense. See McElroy, 865 N.E.2d at 592 (recognizing that the "nature and circumstances of an offense may by themselves outweigh multiple mitigating circumstances"). Although Love has several positive traits, after giving due consideration to the trial court's sentencing decision, we conclude Love has failed to meet his burden of persuading this court that his sentence, which falls above the advisory but below the maximum, is inappropriate.

Conclusion

We conclude the trial court did not abuse its discretion in finding the aggravating and mitigating circumstances. We also conclude Love's sentence is not inappropriate based on the nature of the offense and his character.

Affirmed.

BAKER, C.J., and RILEY, J., concur.